IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1076

HARRY A. SKYDELL and ARNOLD DUTCHEN,
Petitioners,

against

ECOLOGICAL SCIENCE CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants-respondents (other than Harold P. Koenig and George V. R. Mulligan) submit this brief in opposition to the petition filed by two of ninety-nine original and intervening plaintiffs for a writ of certiorari to review an order of the Court of Appeals for the Fifth Circuit filed October 31, 1975, affirming unanimously two orders of the District Court for the Southern District of Florida, which enforced a stipulation of settlement in sixteen consolidated actions and dismissed the actions.[1]

[1] Respondents' time to file this brief was extended from March 3 to March 17, 1976, on application based on advice that the Solicitor General had been requested by the Securities and Exchange Commission to authorize the filing of a brief *amicus curiae* in support of the Petition. Respondents have subsequently been advised by Deputy Solicitor General Friedman that the Solicitor General has determined not to authorize the filing of an *amicus* brief.

Questions Presented

1. Whether the Court of Appeals erred in holding that the District Court was not "clearly erroneous" in finding that petitioners had "knowledgeably accepted and ratified" the terms of the settlement and that the stipulation of settlement was binding upon all parties (see 6a, 12a-13a[2]).

2. Whether, in an action determined by the District Court not to be maintainable as a class action under Fed. R. Civ. P. 23 and in which no notice of pendency had been given to the putative class, a settlement of the individual claims of the original and intervening plaintiffs, which does not directly affect adversely the rights of non-parties, is a breach of fiduciary duty to members of the disallowed "class" and is for that reason void (see 7a-8a).

3. Whether the Court of Appeals erred in declining to review the District Court's dismissal, without notice or approval pursuant to Fed. R. Civ. P. 23.1, of a moot derivative claim, where petitioners had not urged the necessity of notice or approval in the District Court and where the identical claim has been reasserted in a new action (see 9a).

4. Whether the Court of Appeals, having affirmed the District Court's orders that the settlement was binding and the actions properly dismissed, erred in declining to review the District Court's earlier interlocutory order that the actions could not be maintained as class actions pursuant to Fed. R. Civ. P. 23 (see 9a).

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[2] The unanimous opinion of the Court of Appeals is reproduced at pages 1a-9a of the appendices bound with the Petition, and the District Court orders at pages 10a-14a; those appendices are cited herein as "a" with appropriate page references.

Statement of the Case

The record of the proceedings in the District Court is recounted faithfully and in detail in the Court of Appeals' unanimous opinion (see 2a-5a). Petitioners have misstated and omitted significant facts in portraying that record in their Statement of the Case (Petition at 6-9).

Confronted with the undeniable fact that "the stipulation of settlement dealt only with the claims of the ninety-nine named plaintiffs and did not purport to affect in any way the claims of other Ecological stockholders not involved in the litigation" (4a), petitioners strive (to the point of italicizing) to find such effect in a provision of the settlement stipulation authorizing the withdrawal of documents from the Court file and the sealing of the file (Petition at 7). What petitioners fail to add is that all withd awn documents were returned to the District Court file prior to the hearing of the appeal in the Court of Appeals and that an order has been entered by the District Court, on the joint application of all parties, unsealing the file.[3] Hence, even this indirect effect of the settlement on absentees, if it can be considered a cognizable effect at all, has been removed.

Not only are members of the judicially disallowed class of Ecological stockholders free to pursue their individual claims notwithstanding the settlement of this litigation (and free to avail themselves of the record in that litigation); four such stockholders have already commenced actions asserting claims similar to those settled by peti-

[3] Defendants-respondents had undertaken in their brief to the Court of Appeals to make such application. Pertinent excerpts from that brief and the District Court's unsealing order are annexed as an Appendix.

tioners.[4] Two of the complaints purport to assert claims on behalf of a class, in one case similar and in the other identical to that initially pleaded in this litigation. One of the complaints reasserts *in haec verba* the derivative claim which petitioners contend to have been improperly dismissed. The commencement and continued prosecution of these four actions is sufficient answer to petitioners' contention that the rights of absentees have been prejudiced by the settlement of individual claims in this litigation.

Finally, petitioners fail to mention that the principal contention they now press on this Court—that the settlement was void because it entailed a "sale" of fiduciary obligations (Petition at 7, 9-12)—was previously asserted by Thomas G. Jenny (one of the four new plaintiffs) when he sought to intervene in the District Court and in this Court to thwart the settlement. That contention was found wanting in merit when advanced by Jenny.[5] It has no more

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[4] Three of the cases are noted in the Court of Appeals opinion (7a at n. 8); a fourth, *Newton N. Berger* v. *Peter Adolph*, was commenced in the Eastern District of Pennsylvania (No. 75-2354) following the Court of Appeals decision. All four cases have been transferred to the Southern District of Florida pursuant to 28 U.S.C. § 1404(a).

[5] On April 10, 1974, Jenny applied to this Court for a "stay and injunction" to preclude consummation of the settlement, one term of which called for the stipulated withdrawal of a petition for writ of certiorari then pending in this Court (*Pearson* v. *Ecological Science Corporation*, No. 73-596). After Mr. Justice Powell had denied the application, it was resubmitted at Jenny's request to Mr. Justice Douglas, who in turn referred the matter to the full Court, which on April 15 denied the application and simultaneously denied Jenny's motion to intervene in this Court (416 U.S. 933).

After the District Court, by order filed March 1, 1974, had denied Jenny's motion to intervene in that Court, Jenny appealed to the Court of Appeals for the Fifth Circuit and sought an interlocutory injunction, which the Court of Appeals denied on March 13, 1974 (Docket No. 74-1616). Jenny's appeal was subsequently dismissed on July 23, 1974, following defendants' motion to dismiss the appeal for lack of jurisdiction or alternatively as being frivolous and thus dismissable under Fifth Circuit Local Rule 20. The Court of Appeals orders denying an interlocutory injunction and dismissing Jenny's appeal are included at pages 160 and 301, respectively, of the appendix in the Court of Appeals, which has been lodged with the Clerk for the convenience of this Court.

merit, and is no more deserving of plenary consideration by this Court, when tendered by petitioners, who knowledgeably accepted the settlement they now seek to impeach.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANOTHER COURT OF APPEALS.

Petitioners' contention that a conflict of decisions warrants the exercise of certiorari jurisdiction relies upon *Young v. Higbee Co.*, 324 U.S. 204 (1944). *Young*, petitioner contend (Petition at 9-12), compels the conclusion that the settlement in this litigation constituted an impermissible sale of appeal rights by fiduciaries. The Court of Appeals readily and rightly found petitioners' reliance on *Young* "misplaced" in this litigation (8a), since "the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court" (7a).

The rights of the settling parties in *Young*, preferred shareholders of a bankrupt corporation, were found by this Court to be "inseparable" from those of other preferred shareholders (324 U.S. at 209). Any preferential payment to the settling shareholders in *Young* necessarily operated to the detriment of other holders of the same class of securities, in view of the finite fund available to satisfy the claims of all. Moreover, as observed by the Court of Appeals here (8a), the abandonment of the appeal in *Young* was *res judicata* as to the participation of other

preferred shareholders under the plan of reorganization, an effect not present in this litigation, where following the settlement of plaintiffs' individual claims members of the judicially disallowed "class" pleaded in the complaint remained free to assert, and have in fact asserted, independent claims.

Petitioners are no more persuasive in arging that the Court of Appeals' refusal to consider the propriety of dismissal of the derivative claim conflicts with other court of appeals decisions that have corrected errors which were "obvious and clear from the face of the pleadings and record . . . although not raised below" (Petition at 16). No such "obvious and clear" error can be found where, as respondents contended in the Court of Appeals (and would have demonstrated in the District Court had petitioners raised the issue there), "the derivative count was rendered judicially moot in other litigation" (9a). In any event, the reassertion of the derivative count in the *Jenny* action, commenced following the settlement, "will protect the rights, if any, of the corporation" (*ibid.*).

II.

THE PETITION IS UNWORTHY OF CONSIDERATION BY THIS COURT ON ANY OTHER GROUND.

(A) Enforceability of the Settlement.

Two of the five questions presented by the Petition—namely, whether petitioners' acceptance of the settlement was fraudulently procured (Question 4), and whether all conditions precedent to the settlement had been fulfilled (Question 5)—challenge factual determinations which were made by the District Court after an evidentiary hearing (10a-12a) and were affirmed by the Court of Appeals as

supported by "ample evidence" (6a). Certiorari jurisdiction ought not to be exercised to "review evidence and discuss specific facts" idiosyncratic to a particular litigation. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *accord, e.g., Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

(B) Appealability of the Class Action Order.

Petitioners' final contention, that the Court of Appeals erred in declining to review the District Court's earlier interlocutory order denying class action certification, is similarly not worthy of consideration by this Court. The Court of Appeals did no more than recognize the obvious: either the settlement was invalid, in which event the class action determination would remain interlocutory under established precedent in the Fifth Circuit (*e.g., Graci* v. *United States*, 472 F.2d 124 (5th Cir. 1973)); or the settlement was binding, which would extinguish any right of the settling parties to appeal from earlier interlocutory orders. This recognition of the inevitable consequence of settlement is hardly "a fundamental departure from the accepted and usual course of proceedings", much less "a violation of the Federal Rules of Civil Procedure" (Petition at 14).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WALTON LANTAFF SCHROEDER CARSON & WAHL	MILLER WALTON 900 Alfred I. du Pont Building, Miami, Florida 33131 and
MILLER & SUMMIT *Of Counsel*	STUART A. SUMMIT 90 Broad Street, New York, New York 10004. *Counsel for Respondent Ecological Science Corporation*
BRADFORD, WILLIAMS, MCKAY, KIMBRELL, HAMANN & JENNINGS, P.A.	REGINALD L. WILLIAMS 900 Dade Federal Savings Building, 101 East Flagler Street, Miami, Florida 33131 and
SULLIVAN & CROMWELL *Of Counsel*	MICHAEL A. COOPER RICHARD GRANT LYON 48 Wall Street, New York, New York 10005. *Counsel for Respondent Haskins & Sells*
PAUL & THOMSON *Of Counsel*	JAMES W. BEASLEY, JR. 1300 First National Bank Building, Miami, Florida 33131. *Counsel for Respondents Fabian, Grosh and Vollbrecht*
ARONOVITZ, SILVER & BOOTH	SIDNEY ARONOVITZ 908 Ainsley Building, Miami, Florida 33132 and
PAIGE & CATLIN *Of Counsel*	H. JAMES CATLIN, JR. 816 Alfred L. duPont Building, Miami, Florida 33131. *Counsel for Respondents Auerbach, Dean, Davidson, Bartram, Macaluso, Martin and Prusinski*
RUSSO, DUBIN & GOLDBERG *Of Counsel*	MICHAEL GOLDBERG 600 Third Avenue, New York, New York 10016. *Counsel for Respondents Cantor and Carter*